

(25,724)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 894.

G. WASHINGTON LOTT, APPELLANT,

vs.

DAVID W. PITTMAN, SHERIFF OF WARE COUNTY,
GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF GEORGIA.

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1 In the District Court of the United States for the Southern District of Georgia.

In the Matter of Application of G. WASHINGTON LOTT for Writ of Habeas Corpus.

G. WASHINGTON LOTT

vs.

DAVID W. PITTMAN, Sheriff of Ware County.

To the Honorable District Court of the United States for the Southern District of Georgia:

Your petitioner, G. Washington Lott, respectfully represents to this Honorable Court that he is a citizen of the United States, and a resident of the County of Coffee, in the State of Georgia, and that he is unlawfully held in custody by David W. Pittman, Sheriff of Ware County, Georgia, who is about *about* to take his liberty under certain alleged process of authority, wholly without authority of Law, without the jurisdiction of any Court, and contrary to the Laws, and contrary to the rights of your petitioner as a citizen of the United States under the Federal Constitution.

2. Your petitioner further shows that he is now confined in the common jail of Ware County, under a conviction and sentence for murder, in the Superior Court of Coffee County, and was sentenced to life imprisonment, and his case was regularly brought to this Court by a writ of error, as required by Law, and said case came up regularly to be heard in the Supreme Court of Georgia, and that after argument, the Court took the case under advisement, and on the 16th day of November, 1916, the Court rendered a judgment affirming the judgment of the Superior Court of Coffee County, and the Court was evenly divided in its opinion three justices being in favor of a reversal, and three of the justices being in favor of affirming the Court below, and therefore, the judgment of the Court was affirmed by operation of law, under the provision of that part of section 3 of the Act of the General Assembly of Georgia, approved December 17th 1896, which is embraced in section 6116 of the Code of Georgia of 1910, and which is as follows:

2 In all cases decided by a full bench of six justices, the concurrence of the majority shall be essential to a judgment of reversal, and if the justices are evenly divided, the judgment of the Court below shall stand affirmed.

3. Your petitioner shows that three of the Judges did not hear the argument in this case, but participated in the opinion of the Court. Your petitioner contends that he was denied the right to be heard in person or by his Counsel before all of the Justices of the Supreme Court, and that he has been denied a right guaranteed to him by the Constitution and laws of the United States, the benefit of counsel,

to represent him before the *the* Hon. Supreme Court, in that three of the Judges failed to hear the argument in said case.

The defendant contends that this failure of his Counsel to be heard by all of the Justices was in contravention of the Constitution of Georgia, and the Constitution of the United States, which guarantees to him the benefit of counsel, and the right to be heard.

4. Your petitioner shows further that the Act of the General Assembly of Georgia, passed December 17th 1896, authorizing the Supreme Court of Georgia to affirm a case by operation of law, whenever the justices are equally divided in number, part of the act being as follows: "In all cases decided by a full bench of six justices, the concurrence of a majority shall be essential to a judgment of reversal; and if the Justices are evenly divided, the Judgment of the Court below shall stand affirmed, because said act of the Legislature of Georgia is in contravention of that part of the Constitution of the United States which is as follows: "No State shall make or enforce

any law which shall abridge the privileges or immunities of
3 citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," because said Act of the General Assembly and the judgment of the Court rendered thereunder, deprives this movant of his life and liberty without due process of law, and denies to him the equal protection of the laws, and deprives him, a citizen of the United States, and a person within the jurisdiction of Georgia, of his right to have a judicial determination of his guilt or innocence by a reviewing Court."

5. Your petitioner further shows that his case was argued before the Supreme Court of Georgia on the 3rd Monday in June, 1916, and that when his case was argued, the Hon. Price Gilbert was not even a member of the Supreme Court of Georgia, but was appointed afterwards by Gov. N. E. Harris, in September 1916 to fill the place made vacant by the death of Associate Justice Lumpkin.

Your petitioner shows that the Hon. Price Gilbert had no right in law to participate in the opinion of said case without the Supreme Court ordering the case reargued orally. The failure of the case to be reargued orally deprived your petitioner of his liberty without a hearing, and without an opportunity to be heard by all of the Justices of the Supreme Court, and deprived your petitioner of a judicial determination of his case.

Your petitioner shows further that the judgment in this case is null and void, because it was participated in by a Judge who was not a Judge at the time the case was argued; because the action of the Supreme Court deprived the defendant of his liberty without the fundamental right to be heard, which is recognized by all the law writers in the world on American Criminal law, and guaranteed by every constitution of every State in the Union, and the Federal Constitution.

6. Your petitioner shows by the record that three of the justices of the Supreme Court, Chief Justice Fish, Associate Justice
4 Atkinson, and Mr. Justice Beck, were for the reversal; and Messrs. Justice Evans, and Justice Gilbert, and Justice Hill

stood for affirmant. The Judges being equally divided, hopelessly so, the case was affirmed by operation of law.

The defendant contends that this Act of the Supreme Court deprived the defendant of the judicial determination of his case, and deprived him of due process of law, guaranteed by the 14th Amendment of the Constitution of the United States.

7. Your petitioner shows that the decision of the Supreme Court of Georgia was adverse to the claims of your petitioner as heretofore set out, and that said Court was the highest Court of law or equity in said State in which a decision would be had between citizens of the State of Georgia, and the Court of highest and last resort in said State, and said judgment is final in the case.

8. Your petitioner shows that he has exhausted all of his remedies in the State Courts, and that he can get no relief, and therefore, he is calling upon the United States Court for protection of his rights.

9. Your petitioner presents with this application a complete and certified copy of the transcript of the record in the Superior Court of Coffee County, Georgia, and in the Supreme Court of Georgia, which includes a transcript of the record showing the proceedings in both Courts subsequent to said final judgment of the Supreme Court of Georgia, to all the record, reference is hereby prayed.

Wherefore, Petitioner, to be relieved of said unlawful detention, prays that a Writ of Habeas Corpus should be directed to the said David W. Pittman, Sheriff of Ware County, Georgia, may issue in this behalf, so that your petitioner may forthwith be brought before this Court, to do, to submit, and receive whatever the law may direct.

G. WASHINGTON LOTT,
Petitioner.

JOHN RANDOLPH COOPER,
DAVE PARKER,

Att'ys for G. Washington Lott, Petitioner.

5 The facts in the foregoing petition for Writ of Habeas Corpus are sworn to as true and correct, so help me God. This the 22nd day of December, 1916.

G. WASHINGTON LOTT,

Sworn to and subscribed before me this December 22, 1916.

O. J. ALLEN,
N. P. and Ex. Off. J. P., Ware County, Ga.

In open Court, In consideration, It is by the Court ordered that the application for the Writ of Habeas Corpus be, and the same is hereby denied.

This December 23, 1916.

EMORY SPEER,
District Judge.

Marshal's Return.

VALDOSTA, GA., December 26, 1916.

I certify that at Waycross, Ware County, Georgia, within my District, on December 24, 1916. I personally served the within Petition and order upon the within named David W. Pittman, Sheriff of Ware County, Georgia, by exhibiting and reading to him, and allowing him to read, the within petition and order.

The return of Joseph S. Davis, United States Marshal.

By R. L. THOMAS, *Deputy*.

Endorsement of back of petition: United States District Court Southern District of Georgia G. Washington Lott vs. David W. Pittman, Sheriff, etc. Petition for Writ of Habeas Corpus and Order denying. Filed December 23, 1916. Cecil Morgan, Deputy Clerk.

6

EXHIBIT TO PETITION.

Supreme Court of Georgia.

G. W. LOTT

vs.

THE STATE.

7

GEORGIA COFFEE COUNTY:

In the Superior Court of said County.

The Grand Jurors selected, chosen and sworn for the County of Coffee to-wit:

- | | |
|--------------------------|-------------------------|
| 1 S. J. Stubbs, Foreman. | 11. Charlton Gillis. |
| 2. Lee Deen. | 12. M. J. Ferguson. |
| 3. Geo. W. Gillis. | 13. J. H. Roddenberry. |
| 4. Levi Courson, Sr. | 14. W. R. Wilson. |
| 5. A. A. McLean. | 15. J. A. Barnes. |
| 6. G. L. Bush. | 16. J. H. Jordan. |
| 7. R. L. Glisson. | 17. W. H. Tomberlinson. |
| 8. E. L. Bledsoe. | 18. C. N. Fielding. |
| 9. Isaac Corbett. | 19. G. R. Moore. |
| 10. David M. Douglas. | 20. J. T. Rellihan. |

In the name and behalf of the citizens of Georgia, charge and accuse G. W. Lott, of the County and State aforesaid, with the offense of murder for that the said G. W. Lott on the twenty fourth day of November in the year of our Lord, One Thousand Nine Hundred and Fifteen in the County aforesaid, with force and arms, one Warren L. Lott in the peace of God and said State then and there being, then and there unlawfully, feloniously, wilfully and

of his malice aforethought, did kill and murder by shooting the said Warren L. Lott with a certain pistol which the said G. W. Lott then and there held, and giving to the said Warren Lott then and there a mortal wound of which mortal wound the said Warren L. Lott died. And so the Jurors aforesaid, upon the oath aforesaid, do say that the said G. W. Lott him the said Warren L. Lott in manner and former aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the laws of said State, the good order, peace and dignity thereof.

Superior Court, Coffee County, February Term, 1916.

M. D. DICKERSON,
Solicitor General.
JESSE J. LOTT,
Prosecutor.

8 Coffee Superior Court, February Term, 1916.

The Defendant in open Court waives being formally arraigned and pleads not guilty.

M
M. D. DICKERSON,
Solicitor General.

Copy of the bill of indictment and list of witnesses, sworn before the Grand Jury and formal arraignment waived in open Court, this fifteenth day of February 1916.

T. A. WALLACE,
C. A. WARD,
JOHN R. COOPER,
T. A. PARKER,
Defendant's Attorneys.

We, the jury find the Defendant Guilty of murder and recommend the Mercy of the Court. This 15th day of Feb., 1916.

J. F. SMITH, *Foreman.*

In Coffee Superior Court, February Term, 1916.

THE STATE

vs.

G. W. LOTT.

Indictment for Murder and Verdict Guilty of Murder With a Recommendation.

Whereupon, it is considered, ordered and adjudged by the Court that you G. W. Lott the defendant in the above stated case, be taken from the bar of this Court to the common jail of Coffee County,

where you shall be safely kept until demanded by guard to be sent to Prison Commission of the Penitentiary of the State, to whom you shall be by said Jailer delivered.

And you shall then be conveyed by said guard to the Penitentiary of this State, or such other place as the Prison Commission of this State may direct, and you shall then by the said Prison Commission of the Penitentiary be placed and kept at hard labor in said Penitentiary, or such other places as the Prison Commission of this State may from time to time direct, for and during the full end and term of Your Natural Life to be computed from the date of your reception at said Penitentiary.

9 And the Clerk of this Court will notify said Prison Commission of the Penitentiary of your indictment, conviction and sentence, and shall send them a copy of this sentence.

In open Court, this 18th day of February, A. D. 1916.

J. I. SUMMERALL,
Judge S. C. W. C.

10 In the Superior Court of Coffee County, February Term, 1916.

THE STATE

VS.

G. W. LOTT.

Bill of Indictment for Murder, Verdict of Guilty, Motion for New Trial.

And now comes the defendant, in the above stated case, through his counsel T. A. Wallace, T. A. Parker, Calvin Ward, & John R. Cooper, and being dissatisfied with the verdict of the jury and the judgment of the Court, moves for a new trial on the following grounds, to-wit:

1. Because the verdict of the jury in said case is contrary to law.
2. Because the verdict of the Jury in said case is contrary to the evidence.
3. Because the verdict of the jury in said case is against the weight of evidence and without evidence to support it.

Wherefore the defendant asks that these, his grounds for a motion for a new trial be inquired into, and prays a new trial may be granted to him.

T. A. WALLACE,
T. A. PARKER,
CALVIN WARD &
JOHN R. COOPER,
Defendant's Attorneys.

The grounds of the foregoing motion for a new trial read and considered. Ordered, that the Solicitor General show cause as soon as counsel can be heard, why a new trial should not be granted on

each and all grounds thereof, and that said motion be set for a hearing at Waycross, Ga. at chambers, the 15, day of April 1916, it appearing to the Court that it is impossible to file a brief of evidence with this motion, it is therefore ordered that the defendant's counsel have until the hearing of this motion for a new trial to prepare and perfect a brief of evidence had on the trial of said case subject to the approval of the Court.

Ordered further, That the verdict and sentence be suspended and superseded in said case to abide by the final order of the court in the premises.

Ordered further, that this rule nisi be served upon the Solicitor General, this 17 day of Feb'y, 1916.

J. I. SUMMERALL,
Judge S. C. W. C.

Due and legal service of the within motion for a new trial acknowledged and copy and rule nisi and all other services waived.

This February 17th, 1916.

M. D. DICKERSON,
Sol. Gen. W. C.

WAYCROSS, GA., April 15, 1916.

After hearing argument on the within motion for a new trial, the same is hereby overruled and refused, on all the grounds thereof.

J. I. SUMMERALL,
Judge of Waycross Circuit.

12 STATE OF GEORGIA,
Coffee County:

Be it remembered that there came on for trial during the regular February Term, 1916, of Coffee Superior Court, the case of the State of Georgia against G. Wash Lott, an indictment charging him with the offense of murder. He was tried upon said bill of indictment, and convicted by the jury of murder, without capital punishment, and sentenced to the Penitentiary for and during his natural life by the Honorable J. I. Summerall, Judge of the Waycross Circuit, then and there presiding. During said term, and before the adjournment thereof, defendant filed his motion for a new trial upon several grounds, all of which are set forth in the original motion and amended motion for new trial. On the 17th day of February, 1916, a rule nisi was granted by the Honorable J. I. Summerall, Judge as aforesaid, calling upon the State's counsel to show cause before him at Waycross, Georgia, on the 15th day of April, 1916, why said motion for a new trial should not be granted to the defendant, at which time the said motion for a new trial came on regularly to be heard, and after argument, both by counsel for the State and by counsel for the defendant, and after all of the record in said case, consisting of the brief of evidence, charge of the Court, and grounds of the amended motion for new trial, had all been approved as true and consistent as to what transpired upon

the trial of said case, the Honorable J. I. Summerall, Judge as aforesaid, after due consideration, on the fifteenth day of April, 1916, passed an order declining to grant a new trial to the defendant, G. Wash Lott, then and there, on the 15th day of April, 1916, excepted, and now excepts, and assigns the ruling of the Court as error, and contends that the trial Judge committed error in not granting a new trial to the defendant, G. Wash Lott, on each and every ground set forth in the original motion for a new trial
13 and, in the amended motion for new trial, and the defendant assigns the ruling of the Court as error.

And now comes G. Wash Lott, who is here the plaintiff in error, and specifies as a material part of the record to be set up in a transcript of the record to the present term of the Supreme Court of Georgia, the following:

1. The bill of indictment, verdict of the jury, and sentence of the Court.
2. The brief evidence, together with the order approving the same.
3. The charge of the Court, together with the order approving the same.
4. The amended motion for a new trial, together with the order approving the grounds thereof.
5. The original motion for a new trial, together with all orders thereon.
6. The order of the Court declining to grant a new trial to the defendant, G. Wash Lott.

And now comes G. Wash Lott, the plaintiff in error in this case, and within twenty days after the overruling of his motion for a new trial by the presiding Judge, and tenders this his bill of exceptions, and asks that the same may be signed, certified and allowed, according to the form of the statute in such cases made and provided, and that the errors alleged to have been committed, may be reviewed and corrected.

Respectfully submitted,

WALLACE & LUKE,
P. O. Address, Douglas, Ga.;
PARKER & PARKER,
P. O. Address, Waycross, Ga.;
HENRY L. WILSON &
BENNETT & WILSON,
P. O. Address, Waycross, Ga.;
CALVIN WARD,
P. O. Address, Douglas, Ga.;
JOHN R. COOPER,
P. O. Address, Macon, Ga.;

Attorneys for G. Wash Lott, Plaintiff in Error.

Certificate of the Judge.

I do certify that the foregoing bill of exceptions is true and specifies all of the evidence, and specifies all of the record material

to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Coffee County, Georgia is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Present term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

This April 22nd, 1916.

J. I. SUMMERALL,
Judge S. C. W. C.

Clerk's Certificate.

Clerk's Office, Superior Court of Coffee County.

DOUGLAS, GA., May 10, 1916.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case therein stated; and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said Court hereto affixed, the day and year last above written.

[SEAL.]

DAN WALL, *Clerk.*

Due and legal service of the within Bill of Exceptions and writ of error acknowledged; copy and all other and further notice and service waived.

This 26, day of April, 1916.

M. D. DICKERSON,
Solicitor General, Waycross Circuit.
Attorney for State.

Filed in office April 29, 1916. Dan Wall, C. S. C., Ga.

Filed in office May 11, 1916. W. E. Talley, D. C. S. C., Ga.

15

20 Criminal, March Term, 1916.

LOTT

v.

THE STATE.

Per Curiam:

All of the Justices are of the opinion that a new trial is not required by any of the grounds of the motion other than those relating to the charges to the jury on the subject of voluntary and temporary drunkenness. As to these charges the court is evenly divided as to the sufficiently of the evidence to authorize the same. Fish, C. J., and Beck and Atkinson, JJ., are of the opinion that the evidence did not authorize the charges on that subject. Evans, P. J., and Hill and Gilbert, JJ., are of the contrary opinion. It follows that the judgment is affirmed by operation of Law.

Supreme Court of Georgia.

ATLANTA, November 16, 1916.

The Honorable Supreme Court met pursuant to adjournment.
The following judgment rendered:

G. W. LOTT

V.

THE STATE.

This case came before this Court upon a writ of error from the Superior Court of Coffee County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed by operation of law by reason of the equal division of the justices as to whether or not there was evidence to authorize the instruction as to voluntary and temporary drunken-ess. Fish, C. J., and Beck and Atkinson, JJ., favor a reversal and Evans, P. J., and Hill and Gilbert, JJ., favor an affirmance.

17 In the Supreme Court of Georgia, October Term, 1916.

No. 20, Criminal.

WASH LOTT

VS.

THE STATE OF GEORGIA.

Writ of Error from Coffee Superior Court.

Motion for Rehearing.

Now comes the plaintiff in error in the above stated case, Wash Lott, and moves the Court for a re-hearing as provided by rule of Supreme Court, being Section 6257, Code of 1910, and shows the Court as follows:

That he was convicted of murder in the Superior Court of Coffee County, and by that Court was sentenced to like imprisonment.

That his case was regularly brought to this Court upon a writ of error, as required by Law, and said case came on regularly to be heard in this Court, and that after argument, the Court took the case under advisement, and on the 16th day of November, 1916, the Court rendered a judgment affirming the judgment of the Superior Court, because the case was not heard by a full bench of Six Justices, and the Court was evenly divided in its opinion, three Justices being in favor of affirming the judgment of the Superior Court, and three Justices being in favor of reversing said judgment,

and therefore the judgment in the Superior Court was affirmed by operation of law under the provisions of that part of Section Three of the Act of the General Assembly of Georgia approved December 17th 1896, which is embraced in Section 6116 of the Code of Georgia, of 1910, and which is as follows: "In all cases decided by a full bench of Six Justices, the concurrence of a majority shall be essential to a judgment of reversal; and if the Justices are evenly divided, the judgment of the Court below shall stand affirmed."

That part of said Act of the General Assembly of Georgia which provides "if the Justices are evenly divided, the judgment of the Court below shall stand affirmed," is unconstitutional, null and void, for that it contravenes that part of Section One of the Fourteenth Amendment to the Constitution of the United States, which is as follows: "No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the Laws," because said Act of the General Assembly and the judgment of the Court rendered thereunder, deprives this movant of his life and liberty without the due process of law, and denies to him the equal protection of the laws, and deprives him, a citizen of the United States, and a person within the jurisdiction of Georgia, of his right to have a judicial determination of his guilt or innocence by a reviewing Court.

That the Court in rendering said judgment affirming said judgment of the Superior Court overlooked a controlling statute to-wit: That part of Section One of the Fourteenth Amendment to the Constitution of the United States, which is quoted above, and overlooked that said act of the General Assembly of Georgia, which provides that when the Justices are evenly divided, the judgment of the Court below shall stand affirmed, is unconstitutional as contravening the provisions of the Fourteenth Amendment of the Constitution of the United States above referred to.

Additional Grounds of Motion.

This case having been heard before three Justices by oral argument, or rather Wash Lott having appeared by attorneys, the case having been passed upon by the Court as a whole consisting of the entire six Judges, and the defendant not having been heard before the said Six Judges either in person or by attorneys, movant begs leave to call the Court's attention to Section 6115 of the Code of 1910, which is as follows:

"Whenever any Justices in either division differs from the other two as to any particular case pending before it, such case shall go to the Court as a whole, or any one or more justices of the other division may be argued before one division only, it may, upon its own motion, but not otherwise, order a reargument therein.

And movant suggests that the Court hear reargument in this case on its own motion, and this motion is made on account of that clause in the Constitution of the United States, which says, "No

person shall be deprived of life, liberty or property without due process of law, which is to be found in Article 5th of Article 8, of the Constitution of the United States, being Section 6888 of the Code of 1910. Also we beg leave to call attention to Section 6360 of the Code of 1910, the same being paragraph 4, *Secti* Section 1, Article 1 of the Constitution of the State of Georgia, and is in these words:

"No person shall be deprived of the right to prosecute, or defend his own cause in any of the Courts of this State, in person, by attorney or both." The movant in this case not having had the right to prosecute his cause before the Court, who passed on it he humbly moves in addition to the other grounds herein set out, that he be allowed the privileges of a rehearing. The Hon. Price Gilbert was not even a member of the Court when the case was argued but appointed N. E. Harris afterwards in place Associate Justice Lumpkin deceased who did hear the case.

Movant further contends that the statutes, law, and decisions cited in this motion, have been overlooked by the Court, and that they are such as in their opinion, when applied to this case will require or demand a reversal of said decision, and that they have carefully read said decision, and the authorities therein cited, and that the statute, law and decision cited in this motion have been overlooked by the Court in this case.

Wherefore, movant comes during the term at which the judgment sought to be reviewed was rendered, and before the remittitur
20 in the case has been forwarded to the Clerk of the Trial Court, and moves this Honorable Court to grant him a re-hearing and *sey* aside and vacate the judgment heretofore rendered in said case affirming the judgment of said Superior Court.

JOHN R. COOPER,
WALLACE & LUKE,
CALVIN WARD,
BENNETT & WILSON,
W. L. WILSON,
PARKER & PARKER,

Attorneys for Wash Lott, Movant.

21 STATE OF GEORGIA,
Fulton County:

I, John R. Cooper, Counsel for the movant in the foregoing motion, Wash Lott, do certify that I have carefully read, and, upon a careful examination of the opinion of the Supreme Court in said case, decided at the October Term, 1916, No. Criminal 20, from Coffee County, Georgia, I believe that the Court overlooked, in rendering its decision, that part of the Fourteenth Amendment of the Constitution of the United States quoted in said motion, and that the Act of the General Assembly of Georgia, quoted in said motion, is in contravention of said part of said Fourteenth Amendment.

And I do certify further that in my opinion, the statutes, laws,

and decisions set out in said motion and overlooked by the Court, will require, if not demand, a reversal of said Judgment.

This the 24, day of November, 1916.

JOHN R. COOPER,
Attorney for Movant, Wash. Lott.

Atlanta, Ga.

Fioled Filed in office Nov. 24, 1916.

W. E. TALLEY,
D. C. S. C. Ga.

Motion for Rehearing overruled Dec. 19, 1916.

22

Supreme Court of Georgia.

CLERK'S OFFICE, ATLANTA, GA., Dec. 21, 1916.

I hereby certify that the foregoing pages hereto attached contain true copies of the bill of indictment, verdict and sentence, of the motion for a new trial and judgment overruling the same, of the bill of exceptions to said judgment, of the opinion and judgment of the Supreme Court of Georgia and of the motion for rehearing and order of said Supreme Court refusing said motion, in the case of G. W. Lott, plaintiff in error, V. The Staten of Georgia, defendant in error, as appears from the record of said case of file in this office.

Witness my signature and the seal of the Supreme Court of Georgia hereto affixed the day and year above written.

[SEAL.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endorsement on Back. U. S. District Court, So. Dist. Ga. G. W. Lott vs. Pittman, Sheriff of Ware County, Ga. Transcript of Record. Filed December 23, 1916. Cecil Morgan, Deputy Clerk. John R. Cooper, Att'y for Lott.

23 Clerk's Office, Supreme Court of the State of Georgia.

ATLANTA, GA., Jan. 2, 1917.

I hereby certify that the case of G. Washington Lott v. The State of Georgia, was argued in the Supreme Court of Georgia on the 19th day of June, 1916, and that the Honorable S. P. Gilbert having been appointed Associate Justice of said court to fill the vacancy occasioned by the death of Hon. Joseph Henry Lumpkin, qualified as such Associate Justice on the 14th day of September, 1916, all of which appears of record in said Supreme Court.

Witness my signature and the seal of said Court hereto affixed the day and year first above written.

[SEAL.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endors-mne- on Back: District Court of the United States for the Southern District of Georgia, Jan. 6th, 1917. G. Washington Lott vs. David W. Pittman, Sheriff of Ware County, Georgia. Certificate of Judge Gilbert's appointment. John R. Cooper, Att'y for Lott. Filed in Office Jan. 8th, 1917. D. B. Small, Deputy Clerk.

24 In the District Court of the United States for the Southern District of Georgia.

G. WASHINGTON LOTT, Appellant,

VS.

DAVID W. PITTMAN, Sheriff of Ware County, Ga., Ap-ellee.

Petition for Writ of Habeas Corpus.

The above named appellant, G. Washington Lott, conceiving himdelf aggrieved by the judgment made and entered into on the 23rd day of December 1916, by the United States District Court, for the Southern District of Georgia, in the above *above* stated cause, does hereby appeal from said judgment to the Supreme Court of the United States, for the reasons specified in the Assignments on error, which is filed herewith. Appellant alleges that there exists probable cause for said appeal and prays that this appeal may be allowed and that duly authen-icated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

JOHN RANDOLPH COOPER,
Attorney for Appellant.

25 In the District Court of the United States for the Southern District of Georgia.

G. WASHINGTON LOTT, Appellant,

VS.

DAVID W. PITTMAN, Sheriff of Ware County, Ga., Appellee.

Supersedeas.

The above named G. Washington Lott, Appellant, having applied to the undersigned Judge of the United States District Court for the Southern District of Georgia for Writ of Habeas Corpus and his application having been denied, and he having filed his appeal to the Supreme Court of the United States from this decree, order and judgment of this Court denying his application for writ of habeas corpus and citation having duly and regularly issued:

Therefore it is ordered by the Court that said appeal operate as a Supersedeas and the appellee, David W. Pittman, Sheriff of Ware County, Georgia, and his successors in office is hereby ordered and directed to stay all proceedings against the above named appellant, G. Washington Lott, and the execution of the sentence of life imprisonment of the Superior Court of Coffee County, Georgia, until said appeal is finally determined by the Supreme Court of the United States.

It is further ordered that a copy of this order be served upon said David W. Pittman, Sheriff of Ware County, Georgia, together with a citation of this Court by the Marshal or by his Deputy.

This December 23rd, 1916.

EMORY SPEER,
United States Judge.

26 In the District Court of the United States for the Southern District of Georgia.

In the Matter of G. WASHINGTON LOTT, Appellant,

VS.

DAVID W. PITTMAN, Sheriff of Ware County, Ga., Appellee.

Order Allowing Appeal and Certificate of Probable Cause.

It appearing to the Court that F. Washington Lott, of said District has presented a petition of Habeas Corpus against the above named David W. Pittman, Sheriff of Ware County, Georgia, as respondent and that said petition is based in part upon the averments that he, the said G. Washington Lott, has been deprived of his rights as an American Citizen, secured to him by the Constitution of the United States and laws made in pursuance thereof, and in and during the trial for murder in said County of Coffee, in which there was a verdict and conviction upon which he had been sentenced to life imprisonment, that said sentence, unless the same is stayed, will be executed by the said sheriff or officers of the law in said circuit.

And it further appearing that among the Constitutional rights aforesaid, alleged to have been denied in said petition is an averment that he has been deprived of his liberty without due process of law in contravention of the Federal Constitution, because the Judges of the Supreme Court of Georgia are equally divided on this case, three for reversal, and three for affirmance, which cut the defendant off from his right of a judicial determination of his case.

The defendant further avers that he has been denied the right of a hearing by one of the Judges of the Supreme Court of Georgia, who was not even a Judge at the time this case was argued in the Supreme Court of Georgia, and therefore, as the defendant contends, he has been denied the fundamental right of a hearing, and that his liberty is about to be taken contrary to the due process clause of the 14th Amendment of the Constitution of the United States.

27 And it further appearing that this order denying the Writ is a final decision in a proceeding of Habeas Corpus where the detention complained of is by Virture of process issued out of the State Court, this Court is of the opinion that there exists probable cause for an appeal. And it is hereby certified that there is probable cause for the allowance of such appeal to the Supreme Court of the United States and it is accordingly so ordered and granted upon the petitioner giving bond in the sum of Three Hundred Dollars (\$300.00) conditioned according to Law, and a copy of this order be forthwith served by the Marshal upon the Sheriff of Ware County. This Dec. 23rd, 1916.

EMORY SPEER,
U. S. Judge.

28 In the District Court of the United States for the Southern District of Georgia.

G. WASHINGTON LOTT, Appellant,

vs.

DAVID W. PITTMAN, Sheriff of Ware County, Appellee.

Bond on Appeal.

Know all men by these presents that we, G. Washington Lott, as Principal, and T. J. Simmons, as Security, are held and firmly bound unto David W. Pittman, Sheriff of Ware County, Georgia, in the full and just sum of Three Hundred (\$300.00) Dollars, to be paid to the said David W. Pittman, Sheriff of Ware County, Ga., his certain attorneys, administrators, executors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our hands and seal and dated this the 23rd day of December, 1916.

Whereas lately in the District Court of the United States for the Southern District of Georgia on the 23rd day of December, 1916, in a suit depending in said Court, between G. Washington Lott, appellant, and David W. Pittman, Sheriff of Ware County, Georgia, appellee, on decree, order and judgment was rendered against the said David W. Pittman, and the said G. Washington Lott, having obtained an appeal and filed a copy thereof in the Clerk's office of said Court to reverse the decree, order and judgment of the aforesaid suit and a citation directed to the said David W. Pittman, Sheriff of Ware County, Ga., citing and admonishing him to appear at a session of the Supreme Court of the United States at Washington within thirty days from the date thereof.

29 Now the condition of the above obligation is such that if the said G. Washington Lott shall prosecute said plea to effect

an- answer all cost, if he fail to make his plea good, the- the above obligation to be void, else to remain in full force and virtue.

G. WASHINGTON LOTT,
By JOHN R. COOPER, *Att'y.*
T. J. SIMMONS.

Approved by—

EMORY SPEER,

United States Judge.

Marshal's Return.

VALDOSTA, GA., December 26, 1916.

I certify that at Waycross, Georgia, within my District, on December 24, 1916, I personally served the within order of supersedeas and Order Allowing Appeal and certificate of probable cause on the within named David W. Pittman, Sheriff of Ware County, Georgia, by handing to him a copy hereof and exhibiting to him the original orders. At the same time and place I delivered to the said Sheriff a copy of the citation issued in the within named cause.

The return of Joseph S. Davis, United States Marshal.

By R. L. THOMAS, *Deputy.*

Endorsement on back: U. S. District Court, So. Dist. of Ga. G. Washington Lott vs. David W. Pittman, Sheriff of Ware County, Georgia. Petition for Appeal. Supersedeas. Order Allowing Appeal, etc. Bond on Appeal. Filed December 23, 1916. Cecil Morgan, Deputy Clerk.

30

Citation on Appeal.

In the District Court of the United States for the Southern District of Georgia.

G. WASHINGTON LOTT, Appellant,

VS.

DAVID W. PITTMAN, Sheriff of Ware County, Georgia, Appellee.

To David W. Pittman, Sheriff of Ware County, Georgia, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, or your successor in office, pursuant to an order allowing an appeal filed in the Clerk's office of the United States for the Southern District of Georgia, wherein G. Washington Lott is appellant and you are appellee, to show cause, if any there *by* why order and judgment of the United States District Court for the Southern District of Georgia should not be corrected and speedy justice should not be done to the parties in that behalf,

Witness, the Honorable Emory Speer, United States District Judge for the Southern District of Georgia.

This the 23rd day of December, 1916.

EMORY SPEER,
*U. S. District Judge for the Southern
District of Georgia.*

Due and legal service of the within citation of appeal acknowledged and copy waived.

This Jan. 2, 1917.

N. E. HARRIS,
Gov. of Georgia.

Due and legal service of the within citation and appeal acknowledged and copy received.

This Dec. 28th, 1916.

CLIFFORD WALKER,
Att'y Gen. of Georgia.

Endorsement: District Court of the United States for the Southern District of Ga. Jan. 6th, 1917. G. Washington Lott vs. David W. Pittman, Sheriff of Ware County, Georgia. Citation of Appeal. Filed in Office Jan. 8th, 1917. D. B. Small, Deputy Clerk.

31 In the District Court of the United States for the Southern District of Georgia.

G. WASHINGTON LOTT, Appellant,

vs.

DAVID W. PITTMAN, Sheriff of Ware County, Ap-ellee.

Petition for Writ of Habeas Corpus.

Assignment of Error on Petition for Writ of Habeas Corpus.

Now comes G. Washington Lott, Appellant in the above entitled cause, and avers and shows that in the record and proceedings of the said cause, the District Court of the United States erred, to the grievous injury and wrong of the Ap-ellant in said cause and to the prejudice and against the rights of the Ap-ellant herein — the following particulars, to-wit:

1. The said Court erred in denying the petition for Writ of Habeas Corpus and in refusing to grant the same.

2. The said District Court erred in not holding the Act of the Legislature of Georgia of 1896 giving the Supreme Court Judges of the State of Georgia the right to affirm the cases by divided Court, and by operation of law, unconstitutional.

3. The District Court of the United States erred in declining to grant the Writ of Habeas Corpus in this case because the Court was

evenly divided, three of the Judges who heard the argument in the case were for reversal, and three of the Judges who did not hear the argument in the case, were for affirmance.

The defendant contends that when the Court stood divided, the doubt should have been given in favor of the accused, and a new trial granted, instead of resolving the doubt in favor of the State.

4. Because the United States District Court erred in holding that the Act of the General Assembly of Georgia of 1896, giving the Supreme Court the right to affirm a case by operation of law, 32 when the Judges are equally divided, was unconstitutional; and The defendant contends that the Act of the Legislature in question, is unconstitutional and void.

5. Because the District Court of the United States erred in holding that that part of Act of the General Assembly of 1896, which is as follows: "In all cases decided by a full bench of six justices, the concurrence of a majority shall be essential to a judgment of reversal; and if the Justices are evenly divided, the judgment of the Court below shall stand affirmed."

The defendant contends that this part of the Act of the General Assembly of Georgia is in contravention of that provision of the Fourteenth Amendment of the Constitution of the United States, which declares that no person shall be deprived of his liberty without due process of law, and without the equal protection of the law, which is granted to him.

The defendant contends further that this Act of the Legislature is unconstitutional because it deprives the defendant of the right of a judicial determination of his case, by the highest Court in the State.

6. Because the District Court of the United States erred in holding that the defendant was not deprived of his right to be heard by his attorneys before the Judges of the Supreme Court.

The defendant contends that he has been deprived of his liberty without the right to be heard by Counsel, therefore, he has been deprived of his constitutional right, as guaranteed to him by the Constitution of the United States and laws of the United States.

7. Because the District Court of the United States erred in holding that the defendant was not deprived of his constitutional right to be heard by his Counsel orally before all the Judges in that one of the associated Justices, Hon. Price Gilbert, was not even a member of this Court when the case was argued on June 19th, 1916, but was appointed by Gov. N. E. Harris the 14th day of September, 1916.

33 The plaintiff contends that Associated Justice Gilbert had no right in law to pass upon this case unless the case was argued before orally by Counsel, and as he was made a part of the Court after the case was argued he is not qualified to pass on the case.

Wherefore for these and other manifest errors, the said G. Washington Lott, Applicant, prays that the judgment of the District Court of the United States for the Southern District of Georgia be reversed,

and set aside and held for naught and that the writ of habeas corpus prayed for be directed to issue.

JOHN RANDOLPH COOPER,
DAVE PARDU,
Counsel for G. Washington Lott, Ap-ellant.

It is ordered by the Court that the foregoing assignments of error be allowed, and order- to be filed as a part of the Record in said case. This the 6th day of January, 1917.

EMORY SPEER,
United States District Judge.

Endorsement on back: In the District Court of the United States for the Southern District of Georgia. Jan. 6th, 1917. G. Washington Lott vs. David W. Pittman, Sheriff of Ware County, Georgia. Assignment of Errors. John R. Cooper, Att'y for Lott. Filed in Office this Jan. 8th, 1917. D. B. Small, Deputy Clerk.

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Certificate of Clerk.

Office of the Clerk of the United States District Court for the Southwestern Division of the Southern District of Georgia.

G. WASHINGTON LOTT, Appellant,

vs.

DAVID W. PITTMAN, Sheriff of Ware County, Georgia, Ap-ellee.

Appeal from Decision of District Court.

I, Cook Clayton, Clerk of the the United States District Court for the Southern District of Georgia, do hereby certify that the foregoing thirty-three pages of typewritten matter contain a true and correct copy of the record in the above stated case as it now appears of file in the office of the Clerk of said Court at Valdosta, Georgia, this 16th day of January, A. D., 1917.

Witness my official signature and the Seal of said Court, at Valdosta, Georgia, this January 16th, A. D., 1917.

[Seal U. S. District Court, Southern District of Georgia.]

COOK CLAYTON, *Clerk,*
By D. B. SMALL, *Deputy.*

Endorsed on cover: File No. 25,724. S. Georgia D. C. U. S. Term No. 894. G. Washington Lott, appellant, vs. David W. Pittman, Sheriff of Ware County, Georgia. Filed January 24th, 1917. File No. 25,724.

Office Supreme Court, U.

FILED

FEB 12 1917

JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM 1916

No. 894

G. WASHINGTON LOTT

Appellant

vs.

DAVID W. PITTMAN, Sheriff of Ware
County, Georgia.

Appellee

On Appeal from the District Court of the United
States for the Southern District of Georgia.

MOTION TO ADVANCE

CLIFFORD WALKER

Attorney General of Georgia

IN THE SUPREME COURT OF THE UNITED
STATES.

October Term, 1916.

No.....

G. WASHINGTON LOTT, Appellant,

vs.

DAVID W. PITTMAN, Sheriff of Ware County, Georgia.
Appellee.

On appeal from the District Court of the United States For
the Southern District of Georgia.

Motion to Advance.

Now comes the appellee through his counsel, Clifford Walker, Attorney-General of Georgia, and respectfully moves the Court to advance the hearing of the above stated case and in support of said motion submits the following brief statement of the matter involved with the reasons for the motion :

1.

The case is on appeal to revise the judgment of a court of the State of Georgia in a capital criminal case and, under the provisions of Section 710 of the Revised Statutes, is entitled to a precedence on the docket of the Court.

2.

There is no substantial Federal question made in the record and those which are sought to be made are no longer open questions but have been settled by repeated adjudications of this Court.

3.

The assignments of error are frivolous and without merit and to delay the hearing of the case but interferes with the orderly and proper administration of the criminal laws of the State of Georgia and tends to the increase of crime therein.

4.

Especially is this true in this case since it is a capital case, the defendant being confined in jail pending the hearing thereof.

5.

The guilt of the appellant is manifest under the record.

6.

The questions presented in the petition for *habeas corpus* were not urged in the Supreme Court of Georgia, and cannot now be legally urged in this Court.

7.

It is further submitted that the questions presented in the petition of appellant and any rights or remedies which the appellant may have should have been presented and asserted, if at all, by writ of error from the Supreme Court of the United

States to the Supreme Court of Georgia and not by petition for *habeas corpus*.

8.

Appellant was tried in a state court and convicted of murder and sentenced to life imprisonment. His motion for a new trial being denied he carried his case to the Supreme Court of Georgia and that court affirmed the lower court. The Federal question sought to be made in the case appears for the first time in his application to the Judge of the District Court of the United States for the Southern District of Georgia for a writ of *habeas corpus*. The appeal in this case is upon the denial of that application. The accused was tried by the usual procedure provided for the trial of all criminal cases in the State which, by the repeated rulings of this Court, satisfies the due process clause of the Federal Constitution.

Respectfully submitted,

CLIFFORD WALKER, *Attorney-General of Georgia*,

Counsel for Movant.

IN THE SUPREME COURT OF THE UNITED
STATES.

No. October Term, 1916.

| | |
|-------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| G. WASHINGTON LOTT, Appellant, | } On appeal from the Dis- trict Court of the United States for the Southern District of Georgia. Motion to Advance. |
| <i>vs.</i> | |
| DAVID W. PITTMAN, Sheriff of Ware County, Georgia, | |
| Appellee | |

And now comes the appellant and by his counsel of record acknowledges due and legal notice and service of the above and foregoing motion to advance the hearing of the case therein mentioned to be submitted to the Supreme Court of the United States on Monday the 5th day of February, 1917, or as soon thereafter as counsel may be heard.

The appellant, while not admitting the allegations of said motion that his case is without merit and urging to the contrary, joins in the request to advance the hearing of the case and respectfully submits to the Court as an additional reason why said case should be advanced that he is not on bail but is incarcerated in jail where he must remain until his said cause is finally disposed of by this Honorable Court.

This January 24th, 1917.

JOHN R. COOPER,
Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1916.

WASHINGTON LOTT,
Appellant.

vs.

DAVID W. PITTMAN,
SHERIFF OF WARE COUNTY,
GEORGIA,
Appellee.

No. 894.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF JOHN R. COOPER, COUNSEL FOR
WASHINGTON LOTT, APPELLANT.

STATEMENT OF THE CASE.

Washington Lott, the Appellant in this case, is an old man sixty-seven years old. He was tried and convicted in the Superior Court of Coffee County during the February Term, 1916, for the offense of murder, charged with killing his son, Warren Lott. From said conviction, he appealed his case by a motion for a new trial to the Supreme Court of Georgia, where the case was argued by his counsel on the third Monday in July, 1916. The Court rendered a judgment affirming the judgment of the Superior Court of Coffee County, Georgia; and afterwards, a motion for a re-hearing was made by the Appellant upon two grounds:

1. Because the case was affirmed by operation of law and a divided Court, three (3) of the Justices being for him, and three (3) against him.

2. Because the Honorable Price Gilbert, did not hear the argument in the case, and was not even a member on the bench of the Supreme Court of Georgia at the time the case was argued. The case was argued on the third Monday in July, 1916, and Mr. Justice Gilbert was appointed Judge of the Supreme Court to fill the place made vacant by the death of Mr. Justice Lumpkin, on the 14th day of September, 1916, therefore, he did not hear the oral argument. Appellant contends that he had no right to participate in the opinion because his vote tied the Court. If he had not participated in the opinion, the case would have been reversed. He went then, after the overruling of the motion for a rehearing on these grounds, and applied to the Chief Justice of the Supreme Court of Georgia for a Writ of Error to the Supreme Court of the United States, and the same was declined. Having exhausted all of his remedies in the State Courts, he then applied to the Hon. Emory Speer, Judge of the District Court of the United States for the Southern District of Georgia, for a Writ of Habeas Corpus. He declined to grant the Writ, but at the same time, granted an appeal to this Court.

BRIEF OF ARGUMENT.

THE ACT OF THE GENERAL ASSEMBLY OF GEORGIA, 1896, UNCONSTITUTIONAL.

1. The Act of the General Assembly of Georgia of 1896, which provides that "in all cases decided by a full bench of six Justices the concurrence of a majority shall be essential to a judgment of reversal, and if the Justices are evenly divided, the judgment of the Court below shall stand affirmed," is in contravention to the Fourteenth (14th) Amendment of the Constitution of the United States, because it deprives a citizen of the equal protection of the law and denies to him a judicial determination of his case. The constitutionality of this law is attacked by the Appellant. He maintains that this Act of the General Assembly of Georgia is unconstitutional because it deprives him of a judicial determination of his case; in fact, the opinion in

this case binds no one in the world except the accused; the Court of Appeals of Georgia is not even bound by it. They have so decided, and under the fundamental alw of the State of Georgia, the Court of Appeals is bound to follow the decisions of the Supreme Court of Georgia. *The Register Case*, 10 Georgia Appeals, 625.

Where a jury is equally divided in a criminal case, a mistrial is declared and a new trial given to the accused; so where the Supreme Court Judges are evenly divided in a criminal case, where a life is at stake, the judgment should be given in favor of accused and a new trial granted, following the humane law, giving at all times the doubt to the accused. But instead of giving the benefit of the doubt to the accused in this case, the doubt is given to the State, and this old man, sixty-seven (67) years old, is compelled to serve the balance of his life in the penitentiary, on a divided Court. Unfortunately, we have six (6) Judges instead of seven; we should have seven Judges, or nine Judges on the Supreme Court bench of Georgia, so that they could not tie in a criminal case. So we contend that the accused is about to be deprived of his liberty without due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

2. THE RIGHT TO BE HEARD ORALLY BEFORE CONDEMNATION IS RECOGNIZED IN ALL COURTS OF THE CIVILIZED WORLD. Mr. Justice Gilbert who tied the Court in this case did not hear the oral argument. He was not even a Judge of the Supreme Court of Georgia when this case was argued. The case was argued on the 3rd Monday in July, 1916, and he was made a Judge on September 14th, 1916. Now, Appellant claims that he had no right in law to participate in the opinion of his case without ordering the case re-argued orally before him. The right to be heard is a fundamental right, recognized by this Court as guaranteed by the Fourteenth Amendment of the Constitution of the United States. In *Twinning v. New Jersey*, 211 U. S., 111, "Due process requires that the Court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties."

Hovey v. Elliott, 167 U. S., pg. 409.
Roller v. Holley, 176 U. S., pg. 398.
Londoner v. Denver, 210 U. S., pg. 373.
Brown v. New Jersey, 175 U. S., pg. 174.
Hurtado v. California, 110 U. S., 516.
Frank v. Mangum, 137 U. S., 309, 326, 332, 340.

"Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." The judgment affirmed by the Georgia Supreme Court was rendered against Appellant without due process of law, as required by the Fourteenth Amendment of the Constitution of the United States, as no notice was given him and no adequate opportunity to defend was afforded him."

Louis. & Nash. R. R. v. Schmidt, 177 U. S., 230.
Simon v. Croft, 182 U. S., 427.
Davis v. Board of Commissioners, 65 Minn., 310.
Hooker v. Los Angeles, 118 U. S., 318.
Holmes v. Conway, 241 U. S., 625.
Grannis v. Ordean, 234 U. S., 385.

"It is no longer open to contention that the due process clause of the Fourteenth Amendment of the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Iowa Central Railway v. Iowa, 160 U. S., 389.
Wilson v. North Carolina, 169 U. S., 586.
Louis. & Nash. R. R. v. Schmidt, 177 U. S., 236.

Respectfully submitted,

JOHN RANDOLPH COOPER,
T. A. WALLACE,

Counsel for Washington Lott, Appellant.

WILLIAM H. HARRIS
JANUARY 1917
107
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Supreme Court of the United States

OCTOBER TERM, 1916

NUMBER 100

WILLIAM H. HARRIS

DAVID W. HARRIS

WILLIAM H. HARRIS

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

WASHINGTON LOTT,
Appellant,

vs.

DAVID W. PITTMAN,
SHERIFF OF WARE COUNTY,
GEORGIA,
Appellee.

No. 894.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF CLIFFORD WALKER, ATTORNEY-GENERAL OF THE STATE
OF GEORGIA, COUNSEL FOR APPELLEE.

STATEMENT OF THE CASE.

Washington Lott was tried and convicted in the Superior Court of Coffee County, Georgia, for the offense of murder. He appealed his case to the Supreme Court of Georgia which Court affirmed the judgment of the lower Court. Subsequently he filed a motion for a re-hearing in the Supreme Court of Georgia, which motion was duly heard and denied. The Supreme Court of Georgia was equally divided in its judgment and under the laws of the State the judgment of the trial Court stood affirmed by operation of law. While the case was before the Supreme Court of Georgia, after argument but before final consideration of the case, one of the Justices departed this life. A successor was duly appointed by the Governor. Whereupon due and legal notice was given to parties and their counsel in all cases then pending wherein arguments had been heard prior to the ap-

pointment of the new Judge and which were to be passed upon by the new Judge, setting a time for re-argument of such cases. Appellant was thus given ample notice and opportunity to have his case re-argued if he so desired.

BRIEF AND ARGUMENT.

Appellant was given a fair and impartial trial under the procedure duly adopted by the people of his State and uniformly of force in the State.

1. The laws of Georgia provide that: "if the Justices are evenly divided, the judgment of the Court below shall stand affirmed." It was necessary to make provision for cases of equal division, the Court consisting of six Justices. The provision so made is fair and just and does not contravene the 14th amendment to the Constitution of the United States. A defendant is brought to trial under the procedure of force in his State and the judgment of that Court is against him. He appeals, alleging error in the trial of his case. The burden is upon him. It, therefore, follows that if the appellate court is divided equally or if the majority of the court is of the opinion that the judgment of the court below was right, the judgment must stand affirmed.

2. What has been said as to procedure in this case applies also to the second point made in the brief of counsel for appellant. The rule of the Supreme Court of Georgia as applied in all cases was followed in this case. Five of the six Justices presided when the case was argued originally. When the sixth Judge was seated on the bench due and legal notice and opportunity to re-argue the case was given. It certainly can not be urged that the appellant did not have the benefit of due process of law.

3. The only principle involved in this case is clearly stated in the *Twining* case. The rule there stated is that "due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these

two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries; this Court has, up to this time, sustained all State laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law." *Twining vs New Jersey*, 211 U. S. 111, and cases cited. There is no question as to the jurisdiction of the Supreme Court of Georgia. The record shows that there was a full and timely notice and opportunity for hearing given the parties. We respectfully submit, therefore, that under the rule in the *Twining* case the procedure in this case has been thoroughly consistent with due process of law.

Respectfully submitted,

CLIFFORD WALKER,
Attorney-General,
Counsel for Appellee.

LOTT v. PITTMAN, SHERIFF OF WARE COUNTY,
GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 894. Submitted April 13, 1917.—Decided April 30, 1917.

A writ of error to review a sentence of murder was heard by the Supreme Court of Georgia *in banc* and, the six justices being evenly divided, the sentence was affirmed pursuant to Georgia Code of 1910, § 6116. Three of the justices participating did not hear the argument, and one of them, voting affirmance, was not then appointed, but after his appointment and before the affirmance notice

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Opinion of the Court.

was given affording the convicted person opportunity for a reargument, of which he did not avail himself. *Held*, that the affirmance was not in violation of due process of law.

A right of appeal is not essential to due process under the Fourteenth Amendment, and where it is allowed the State may prescribe the conditions and procedure.

THE case is stated in the opinion.

Mr. John Randolph Cooper and *Mr. T. A. Wallace* for appellant.

Mr. Clifford Walker, Attorney General of the State of Georgia, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition in *habeas corpus*, in which appellant was petitioner, which presents the following facts, stated narratively:

Appellant is confined in the common jail of Ware County in execution of a life sentence upon conviction for murder, the sentence having been affirmed by the Supreme Court of the State. The court was evenly divided in opinion and therefore the judgment was affirmed by operation of law under the provision of that part of § 6116 of the Code of Georgia of 1910 which is as follows: "In all cases decided by a full bench of six Justices, the concurrence of a majority shall be essential to a judgment of reversal; and if the Justices are evenly divided, the judgment of the court below shall stand affirmed."

Three of the judges did not hear the argument but participated in the opinion of the court.

The case was argued before the Supreme Court on June 3, 1916, and when it was argued Justice Gilbert was not even a member of the court but was appointed in

September, 1916, to fill the place made vacant by the death of a member of the court.

Upon these facts it is averred that appellant was denied a right guaranteed by the Constitution and laws of the United States, the benefit of counsel and right to be heard, which abridged his privileges and immunities as a citizen of the United States, deprived him of liberty without due process of law and of his right to have a judicial determination of his guilt or innocence by a reviewing court.

Attached to the petition was a transcript of the record in the trial court and the Supreme Court.

His prayer to be discharged was denied. An appeal was allowed, the court certifying that there was probable cause.

It appears from the transcript of the record that the judgment affirming the sentence was rendered after Justice Gilbert had taken his seat as a member of the court and that if he had not taken part the judgment would have been reversed. It also appears that after the judgment a petition for rehearing was filed which attacked the statute permitting a judgment of affirmance by a divided court upon the same grounds as those alleged in the petition for *habeas corpus* and now urged here, and also attacked the judgment for the participation therein of Justice Gilbert.

It was stated in the petition for rehearing as follows:

"This case having been heard before three Justices by oral argument, or rather Wash Lott having appeared by attorneys, the case having been passed upon by the Court as a whole consisting of the entire six Judges, and the defendant not having been heard before the said six Judges either in person or by attorneys, movant begs leave to call the Court's attention to Section 6115 of the Code of 1910, which is as follows:

"Whenever any Justice in either division differs from the other two as to any particular case pending be-

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fore it, such case shall go to the Court as a whole, or any one or more Justices of the other division may be argued before one division only, it may, upon its own motion, but not otherwise, order a reargument therein.”¹

It was suggested that the court “hear reargument in this case on its own motion” because the court had overlooked the section of the code quoted above and the provision of the Constitution of the United States which gives assurance that no person shall be deprived of his liberty without due process of law.

The petition was filed November 24th and overruled December 19, 1916. Upon what consideration it does not appear; but it may be presumed that the court was of opinion that the statute of the State had been adequately complied with. The Attorney General asserts in his brief, and there is no denial by appellant, that after the appointment of Justice Gilbert notice was given to parties and counsel in all cases then pending in which argument had been heard prior to his appointment and which were to be passed on by him, setting a time for reargument of such cases. The appellant, therefore, was given an opportunity to be heard. Besides the right of appeal is not essential to due process. *Reetz v. Michigan*, 188 U. S. 505, 508. It was, therefore, competent for the State to prescribe the procedure and conditions, and the cases cited by appellant are not apposite.

Order affirmed.

¹ REPORTER'S NOTE: This section was erroneously codified in the Code of 1910. It should read as follows: “Whenever any Justice in either division differs from the other two as to any particular case pending before it, such case shall go to the court as a whole for decision; and whenever it decides a case which has been argued before one division only, it may, upon its own motion, but not otherwise, order a reargument therein.” See Code of 1911, § 6115, and note.